Jurisdictional Statement

Supreme Court, U.S.
FILED
APR 5 1982

81-1855

No._____

IN THE

Supreme Court of the United States

October Term, 1981

RED OWL STORES, INC.,

Appellant,

vs.

COMMISSIONER OF AGRICULTURE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

CURTIS D. FORSLUND
THOMAS DARLING
SUSAN L. SEGAL
GRAY, PLANT, MOOTY,
MOOTY & BENNETT
300 Roanoke Building
Minneapolis, MN 55402
Telephone: (612) 343-2800

April 5, 1982

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Whether the "below cost sales" provision of the Minnesota Dairy Industry Unfair Trade Practices Act, both as written and as applied in this case, violates the due process clause of the Fourteenth Amendment of the Constitution of the United States, because the definition of "cost" contained in the statute is so vague that it provides no meaningful guidance to retailers attempting to comply with it, it excludes cash discounts of up to 2% from being reflected in the calculation of "cost" and it has been applied to define the "cost" for any given dairy product as an average of the costs for all products in a store, when all parties acknowledge that this does not equal true cost.

LIST OF ALL PARTIES

All parties to this proceeding appear in the caption of the case to this Court.[1] Commissioner of Agriculture refers to the Commissioner, Minnesota Department of Agriculture.

[1] The parent corporation of Appellant is Gamble-Skogmo, Inc. Gamble-Skogmo, Inc. is a wholly-owned subsidiary of Wickes Companies, Inc. Appellant's subsidiaries, excluding wholly-owned subsidiaries, include Center Pharmacy, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of All Parties	i
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdictional Grounds	2
Constitutional and Statutory Provisions	2
Statement of the Case	4
The Questions Are Substantial	7
Conclusion	13

APPENDIX INDEX

Red Owl Stores, Inc. v. Commissioner of Agriculture, 310 N.W.2d 99 (Minn. 1981)	A-1
Red Owl Stores, Inc. v. Commissioner of Agriculture, Order, No. 757948 (Minn. Dist. Ct. July 8, 1980)	A-13
Red Owl Stores, Inc. v. Commissioner of Agriculture, Memorandum Decision, No. 757948 (Minn. Dist. Ct. May 19, 1980)	A-14
Red Owl Stores, Inc. v. Commissioner of Agriculture, Findings of Fact and Conclusions of Law, No. 757948 (Minn. Dist. Ct. June 13, 1980)	A-17
Commissioner of Agriculture v. Red Owl Stores, Inc., Final Order, No. A6-76-007-MG (Comm'r. of Agriculture June 26, 1979)	A-24
Commissioner of Agriculture v. Red Owl Stores, Inc., Report of Hearing Examiner (November 28, 1978)	A-25
Notice of Appeal	A-44

TABLE OF AUTHORITIES

Page

Cases:

Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925) 9

Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980) 9

William Inglis & Sons Bak. Co. v. ITT Cont. Bak. Co., Inc., 389 F. Supp. 1334 (N.D. Cal. 1975), *rev'd on other grounds*, 526 F.2d 86 (9th Cir. 1975) 11

Baseline Liquors v. Circle K Corporation, 129 Ariz. 215, 630 P.2d 38 (Ct. App. 1981), *cert. denied* 50 U.S.L.W. 3352 (11/2/81) 12

Standard Store v. Safeway Stores, Inc., Trade Reg. Rep. (CCH), 1955 Trade Cases ¶ 68,153 at p. 70,743 (Colo. Dist. Ct. 1955) 11

Cohen v. Frey & Son, 177 Md. 586, 80 A. 2d 267 (1951) 10

Blue Flame Gas Ass'n v. McCook Public Power District, 186 Neb. 735, 186 N.W.2d 498 (Sup. Ct. 1971) 8

Statutory Provisions:

Minnesota Statutes § 32A.01, et seq. ..... *passim*

Minnesota Statutes § 325D.01, et seq. ..... *passim*

Other Authority:

Dairy Practices Bulletin 75-1 (December 15, 1975) 9

Henderson, *Selling Below Cost in Wyoming*, 1 Land & Water L. Rev. 235 (1966) 11

No._____

IN THE

Supreme Court of the United States

October Term, 1981

RED OWL STORES, INC.,

Appellant,

vs.

COMMISSIONER OF AGRICULTURE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court, which appears in the appendix hereto, p. A-1, is reported at 310 N.W.2d 99 (Minn. 1981).

The Memorandum Decision and Findings of Fact and Conclusions of Law of the District Court of the Fourth Judicial District of the State of Minnesota, dated May 19, 1980 and June 13, 1980, respectively, are not reported. They are reprinted in the appendix hereto, p. A-14, A-17.

The Report of Hearing Examiner of the Department of Agriculture, dated November 28, 1978, is not reported. It is reprinted in the appendix hereto, p. A-25.

STATEMENT OF JURISDICTIONAL GROUNDS

Red Owl Stores, Inc., the appellant, appeals from the final judgment of the Minnesota Supreme Court, dated September 18, 1981, holding that Minnesota Statute § 32A.04, Subdivision 1(o), which incorporates by reference the definition of cost set forth in Minnesota Statute § 325D.01, Subdivision 5, is constitutional. The denial of appellant's petition for rehearing was filed on January 5, 1982. This appeal is being docketed in this Court within 90 days from the denial of rehearing below. A notice of appeal to this Court was duly filed in the Supreme Court of the State of Minnesota on April 2, 1982, see p. A-44, *infra*. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Minnesota Statutes, Section 32A.04, Subdivision 1(o):

> The provisions of section 325D.04 shall apply to and include a manufacturer of any selected dairy product. No manufacturer, wholesaler, distributor or retailer of a selected dairy product engaged in business within this state shall sell, offer for sale or advertise for sale any selected dairy product below "cost" as that term is defined in section 325D.01 or give, offer to give, or advertise the intent to give away any selected dairy product for the purpose or with the effect of violating sections 32A.04, 32A.07, 325D.03, 325D.04, and 325D.06. The

prima facie rule of evidence provisions of this section and 325D.06 shall apply to any such violation. And it is the legislative intent that the provisions for relief set forth in 32A.09 shall apply to any legal action under this paragraph.

Minnesota Statutes, Section 325D.01, Subdivisions 5, 6, 7:[2]

The term "cost," as applied to the wholesale or retail vendor, means:

(1) The actual current delivered invoice or replacement cost, whichever is lower, without deducting customary cash discounts, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business at that location by the vendor

* * *

The term "customary cash discounts" means any allowance not exceeding two percent, whether a part or larger discount or not, made to the wholesale or retail vendor, where the wholesale or retail vendor pays for merchandise within a limited or specified time.

* * *

The "cost of doing business" or "overhead expense" is defined as all current costs of doing business in the conduct of such business and must include, without limitation, the following items of expense: Labor, including salaries and bonuses of executives and officers, rent, depreciation, selling costs, maintenance of equip-

[2] In 1980, Chapter 325 of the Minnesota Statutes was renumbered as Chapter 325D. Thus, the references to Sections 325.01 and 325.04 in the opinions below, now appear as 325D.01 and 325D.04.

ment, delivery costs, all types of licenses, taxes, insurance, and advertising, and other fixed and incidental expenses.

* * *

Minnesota Statutes, Section 325D.04:

> Any retailer, wholesaler, sub-jobber or vending machines operator engaged in business within this state, who sells, offers for sale or advertises for sale any commodity, article, goods, wares, or merchandise at less than the cost thereof to such vendor, or gives, offers to give or advertises the intent to give away any commodity, article, goods, wares, or merchandise for the purpose or with the effect of injuring a competitor or destroying competition, shall be guilty of unfair discrimination; and, upon conviction, subject to the penalty therefore provided in section 325D.69, subdivision 2.

STATEMENT OF THE CASE

Appellant Red Owl Stores, Inc. ("Red Owl") operates retail grocery stores in various locations throughout Minnesota. In 1976, the Commissioner of Agriculture ("Commissioner") for the State of Minnesota issued two complaints against Red Owl which were later consolidated. The complaints alleged that Red Owl had sold certain "selected dairy products" (milk and ice cream) below cost in violation of Section 32A.04, Subd. 1(o) of the Minnesota Dairy Industry Unfair Trade Practices Act ("Act"). This section of the Act provides in essence that no retailer of selected dairy products may sell any selected dairy product "below cost" for the purpose or with the effect of "restraining, lessening or destroying competition" or "injuring one or more competitors."

The matter proceeded to hearing before a hearing examiner who issued a report finding that Red Owl had violated the Act by selling below cost. In a one-page order, the Commissioner of Agriculture adopted the report of the hearing examiner and ordered Red Owl to cease and desist from further violating the Act. The matter was appealed to the Minnesota District Court for the Fourth Judicial District. That court vacated the order of the Commissioner and dismissed the complaints because it found the sales below cost provisions of the Act to be unconstitutional. On appeal, the Minnesota Supreme Court reversed the district court and reinstated the order of the Commissioner. This appeal is taken from the final decision of the Minnesota Supreme Court.

The factual context of this matter may be briefly summarized as follows. At various times in 1975 and 1976 Red Owl sold certain milk and ice cream products at prices the Commissioner contended were "below cost" as that term is defined by the Act. The sales at issue were made in seven different locations throughout the State of Minnesota. None of the products were sold at prices below the price Red Owl paid for them ("invoice cost"). In fact, Red Owl sold these milk and ice cream products at prices between 3% and 12% above invoice cost. Despite these substantial markups, the Commissioner contended that Red Owl's prices were below cost.

The parties stipulated as to the total annual sales in dollars of the stores at issue. In addition, the parties stipulated as to the total annual expenses (including those directly expended by the store in question and certain allocated administrative expenses) of the stores at issue. Finally, the parties stipulated the ratio (expressed as a percentage) between these total

store expenses and total store sales for each store at issue. These percentages ranged from 19.49% to 23.65%.

At the administrative hearing the Commissioner took the position, which was directly contrary to his earlier published interpretation of the Act, that this ratio of total annual store expenses to total annual store sales constituted the "cost of doing business" for the purposes of the Act for not only each of the stores at issue and for each of the limited time periods at issue, but also for each of the selected dairy products at issue. These percentages from the stipulated figures were the only evidence presented by the Commissioner of the cost of doing business. The Commissioner acknowledged that the evidence demonstrates that this ratio is simply a storewide average and that in fact each selected dairy product at issue had a "true cost" associated with it that was different from this average. The process of determining this true cost through a particularized allocation of store expenses to products, rather than a gross average, is a difficult task, susceptible to several different methods of calculation. Under one of these methods of allocation, which was presented by Red Owl below, the cost of doing business for the selected dairy products at issue in this case was determined to be as low as 2%—a figure below Red Owl's markup, establishing that under at least one plausible method of allocating expenses, Red Owl's prices were not "below cost."

The method of allocation utilized by Red Owl took account of the sales velocity (rapid turnover, high volume) of dairy products. For any given period of time a greater number of selected dairy products will be sold per unit of floor space in a store than will other products. In addition, this method

took into account the fact that while the advertised special prices at issue here were in effect the volume of sales of selected dairy products increased dramatically. These increases, combined with the fact that most store expenses are fixed in the short run, result in a cost of doing business for these selected dairy products which is substantially lower than the ratio of total annual store expenses to total annual store sales. Nevertheless, the Minnesota Supreme Court held that the ratio for all products was a proper approximation of the cost of the specific products at issue.

THE QUESTIONS ARE SUBSTANTIAL

The "below cost" provision of the Dairy Industry Unfair Trade Practices Act, both as written and as applied in this case, raises a number of serious due process issues. The Act and the Minnesota Supreme Court decision that is the subject of this appeal affect all Minnesota retail grocers, not just Red Owl. Indeed, Minnesota retailers of all types are directly affected because the crucial definitions of "cost" and "cost of doing business" are the operational definitions in Minnesota's statute prohibiting selling below cost (Minn. Stat. § 325D.04 (1980)) which applies to all retailers. Moreover, the day-to-day lives of all Minnesota consumers are affected because the Act is the direct cause of artificially high prices for dairy products such as milk. This extraordinary impact underscores the importance of the issues raised by this appeal.

The fundamental constitutional failing of the Act is that the definitions of "cost" and "cost of doing business" are so vague and ambiguous that they provide no meaningful guidance to retailers attempting to comply with the Act. The definition of "cost" provides that cost equals invoice cost plus the "cost of doing business." The definition of "cost of doing business," in turn, contains a large list of expenses which are

components of cost of doing business. However, the definition is silent on the way these expenses are to be allocated to specific products such as milk and ice cream. This omission is critical because a retailer that does not know how to allocate its expenses under the Act cannot know if its prices are below cost in violation of the Act. *Cf. Blue Flame Gas Ass'n v. McCook Public Power District*, 186 Neb. 735, 738, 186 N.W.2d 498, 500 (Sup. Ct. 1971) (Similar provision under Nebraska below cost sales statute held void for vagueness), and cases cited therein. The only course open to retailers is to set prices at a level they believe will make a profit and risk violating the Act.

The case at hand is a perfect example of the magnitude of that risk. In St. Cloud, Minnesota, during an advertised special, Red Owl sold milk at a 12 percent markup over invoice cost. This sale price had all of the indicia of a proper price—a price not below cost: it was substantially above invoice cost; there was a substantial increase in sales volume when the price was in effect and there was an increase in gross profit. Nevertheless, the Minnesota Supreme Court decided that Red Owl's expenses were to be allocated to the milk being sold in a way which resulted in the prices being below cost and Red Owl was found to have violated the Act. The expense allocation method used by the Minnesota Supreme Court did not appear anywhere in the Act or the Act's definition of cost; there was no way that Red Owl could protect itself.

The Minnesota Supreme Court attempted to remedy the Act's total failure to specify a method of allocating expenses by stating that the Act merely requires "a cost figure arrived at by reasonable accounting standards," p. A-7, *infra*. However, this does nothing to remedy the Act's vagueness because the undisputed evidence was that there are several allocation methods and accounting standards which might be deemed reasonable, each of which would produce different "costs".

Red Owl presented extensive testimony on various methods of allocation including, among others, allocation based on shelf space; on the ability of the particular product to absorb indirect and joint costs; on the number of units of the product; and on the gross sales in dollars. The Act provides absolutely no guidance as to which of the many reasonable methods of allocation is to be used to determine whether a price is below cost.

The practical effect of the Act's vagueness in failing to establish a method of allocating expenses is highlighted by the arbitrary and inconsistent positions taken by the Commissioner of Agriculture in enforcing the Act in this case. Before he commenced this action against Red Owl the Commissioner took the position in a Dairy Practices Bulletin[3] issued to the Minnesota retail grocery industry that under the Act the cost of a selected dairy product was what the retailer paid for it plus selling and other expenses properly attributable *to that selected dairy product*. After he commenced this action, however, the Commissioner changed his mind and asserted that under the Act the cost of a selected dairy product was what the retailer paid for it plus the average selling and other expenses for all products in the entire store rather than those properly attributable to the selected dairy product. The unconstitutional vagueness of the Act made this change of position possible. *Cf. Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980) (history of inconsistent application attests to unconstitutional vagueness of definition and "evidences the evils the vagueness doctrine is designed to avoid."); *Small Co. v. American Sugar Refining Co.*, 267 U.S.

[3] Dairy Practices Bulletin 75-1 issued December 15, 1975. The pertinent portion of the Bulletin is as follows: "For a . . . retailer 'cost' means the purchase price of the selected dairy product plus all selling, administrative, and other general expenses *properly attributable to the selected dairy product.*" *Id.*, at p. 2. (Emphasis added).

233, 239 (1925) ("void for vagueness" doctrine applicable to civil as well as criminal actions).

The Act as written also violates the due process clause because the definition of cost provides that, in all cases without exception, any discount for prompt payment (cash discount) of two percent or less that is actually received by a retailer of selected dairy products may not be deducted from the invoice cost of the product. Because cash discounts may not be deducted, the Act arbitrarily forces an overstatement of cost each time a retailer actually receives such discounts. The Maryland Court of Appeals pinpointed this problem in *Cohen v. Frey & Son*, 177 Md. 586, 80 A.2d 267, 278 (1951), in which it declared the Maryland Fair Sales Act unconstitutional: "[Although] . . . defendant is selling 'below cost' [it is] not below his actual cost, but below 'cost' determined by an arbitrary formula which swells his actual cost by ignoring actual cash discounts received. . . ." Furthermore, the overstatement mandated by the Act is conclusive. A retailer who in fact receives a cash discount of two percent simply may not prove that its cost is two percent lower. Since selling below cost is an essential prerequisite to violation of the Act, this conclusive presumption directly affects liability under the statute.

Similarly, the Act, as applied in this case, reflects arbitrary enforcement and an abridgement of due process of law. As noted, the Minnesota Supreme Court stated that a reasonable method of allocating expenses was implicit in the Act's definition of "cost of doing business". It then went on to conclude that the use of the ratio of total yearly store expenses for all products to total yearly store sales for all products was a proper method of allocating expenses to determine cost of doing business for the specific selected dairy products at issue. This method of allocation assumes that the cost of doing busi-

ness, expressed as a percentage, is identical for each of the thousands of items in a retail grocery store.

This conclusion is wholly arbitrary and irrational. Every witness who testified on this issue agreed that the costs for the various products in the store were not identical. The Commissioner's own representative testified that this averaging method of allocation meant by its very terms that the costs for individual products were different from the average cost for all products. Nevertheless, under this method of allocation, unless all selected dairy products are marked up by at least the ratio of expenses to sales for all products in the store, their prices will be below cost.

By arbitrarily insisting that a flat percentage of overall costs of doing business be allocated to each selected dairy product, the Minnesota Court is engaged in a distortive fiction. *See* Henderson, *Selling Below Cost in Wyoming*, 1 Land & Water L. Rev. 235, 253 (1966). Although this method of allocating costs may be administratively convenient, it is an allocation process "unknown to the retail grocery business," *Standard Store v. Safeway Stores, Inc.*, Trade Reg. Rep. (CCH), 1955 Trade Cases ¶ 68,153 at p. 70,743 (Colo. Dist. Ct. 1955), and is entirely unrelated to the actual cost of the individual items sold. As a number of courts have pointed out under similar "below cost" statutes, a method of allocating costs of doing business is legally acceptable only if the result is reasonably related to the burden of producing or distributing the individual item. *See, e.g., William Inglis & Sons Bak. Co. v. ITT Cont. Bak. Co., Inc.*, 389 F. Supp. 1334, 1344 (N.D. Cal. 1975), *rev'd on other grounds*, 526 F.2d 86 (9th Cir. 1975) (involving the Robinson-Patman Act and the California Unfair Practices Act). Under the Minnesota Court's method, no allowance is made for the differences between the types of

articles sold in a retail grocery store. No consideration is given to the amount of effort and expense required to prepare items for distribution. For example, this method fails to reflect the shelf life of the product—whether it is perishable and sold within a few days (milk, for example), or whether it is a stable item traditionally inventoried for long periods of time.

The Minnesota Supreme Court's conclusion that under the Act the cost of doing business for selected dairy products is equal to the ratio of total expenses to total sales converts the Act from a "below cost" sales law to a minimum markup law. The only way retailers can avoid selling at a price which is below cost is to have a minimum percentage markup equal to the ratio of total store expenses to total store sales. However, unlike typical minimum markup laws the Act does not permit a retailer to demonstrate that its costs are lower than the minimum markup set by the Act. The Act as applied here thus creates a conclusive, irrebuttable presumption of what the cost is for all selected dairy products. In this respect the case at hand is fundamentally different from the minimum markup law in the case of *Baseline Liquors v. Circle K Corporation*, 129 Ariz. 215, 630 P.2d 38 (Ct. App. 1981) *cert. denied* 50 U.S.L.W. 3352 (11/2/81), in which this Court recently denied certiorari because in the *Baseline* case the statute allowed sellers to prove that their actual costs were less than the statutorily required markup. The Minnesota Act as applied allows no proof of lesser cost and thus imposes on sellers an arbitrary markup without any recourse.

Finally, the end result of the Act's scheme is to grant the competitors of a retailer the means to stifle competition and enforce artificially inflated price levels. Under the statutory scheme, as interpreted by the Minnesota Supreme Court, competitors need only file a charge with the Department of

Agriculture, or initiate a private treble damage action under the statute, Minn. Stat. § 32A.09, and feel safe in the knowledge that the retailer so charged will be required to maintain a price markup level, similar to the 20% level found in this case, regardless of the retailer's actual costs. Such a scheme is arbitrary, anticompetitive and deprives retailers of due process of law.

CONCLUSION

For all of the foregoing reasons this Court should exercise jurisdiction over this appeal.

Respectfully submitted,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT
CURTIS D. FORSLUND
THOMAS DARLING
SUSAN L. SEGAL
Counsel for Appellant
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

Dated: April 5, 1982.

Appendix

APPENDIX

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

51638

RED OWL STORES, INC., Petitioner,
Respondent,

vs.

COMMISSIONER OF AGRICULTURE,
Appellant.

January 5, 1982

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

IT IS FURTHER ORDERED that no attorneys fees are allowed pursuant to the provisions of Rule 140, Rules of Civil Appellate Procedure.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

No. Sp. Peterson, J.

Hennepin County

51638

RED OWL STORES, INC., Petitioner,

Respondent,

vs.

COMMISSIONER OF AGRICULTURE,

Appellant.

Endorsed
Filed September 18, 1981
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

The provision of the Dairy Unfair Trade Practices Act prohibiting sales below cost, Minn. Stat. § 32A.04, subd. 1(o) (1978), which incorporates by reference the definition of cost set forth in Minn. Stat § 325.01, subd. 5 (1978), does not violate due process, and the commissioner's determination that sales were made of certain dairy products below cost for the purpose or with the effect of injuring a competitor or destroying competition is sustained.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Respondent Commissioner of Agriculture (hereinafter commissioner) appeals from the decision of the district court vacating the commissioner's order which determined that petitioner Red Owl Stores, Inc. (hereinafter Red Owl) had violated the sales-below-cost prohibitions of the Dairy Unfair Trade Practices Act. We reverse.

Red Owl is a retailer of "selected dairy products" as that term is defined in the Minnesota Dairy Industry Unfair Trade Practices Act (hereinafter Dairy Act), Minn. Stat. ch. 32A (1978). In 1975 and 1976, Red Owl advertised and sold selected dairy products, including milk and ice cream, at reduced retail prices in a number of Minnesota communities. During and after these promotion periods, which lasted approximately 1 to 3 weeks, Red Owl's share of the market purportedly increased.

In June and August 1976, the commissioner issued two complaints against Red Owl, contending that it sold, offered and advertised for sale selected dairy products below cost in violation of a provision of the Dairy Act, Minn. Stat. § 32A.04, subd. 1(o) (1978). "Cost," as statutorily defined, includes the invoice cost, without deducting customary cash discounts, plus the cost of doing business. The commissioner estimated that the cost of doing business, based on a store-wide average, was between 20 and 23%. He alleged that Red Owl was selling milk at prices from 5 to 16 cents per gallon below cost and 5-quart pails of ice cream at 26 cents below cost.[1]

At the hearing on the consolidated actions, Robert Thimmesh, the director of the Dairy Practices Division of the Minnesota Department of Agriculture, testifed for the commissioner. Mr. Thimmesh indicated that Red Owl's accounting method allocated costs on the basis of percentage of sales. He stated that the vice president and general counsel for Red Owl had told him that the cost of doing business was approximately 22%.

---

[1] In calculating the cost, the commissioner did in fact allow a deduction for cash discounts despite the statutory language to the contrary.

Marvin Babcock and Michael Whitman, grocers in Fairmont, Minnesota, at the time of the alleged violation, who testified on behalf of the commissioner, acknowledged that they had noticed reduced sales in their stores during the time that Red Owl had advertised reduced prices. Mr. Babcock, whose grocery store went bankrupt, asserted that his business failure was due, at least in part, to the fact that Red Owl had lowered prices and lured away customers.

Several officers of Red Owl testified on its behalf, including Paul Nelson, director of grocery operations. Mr. Nelson stated that Red Owl had attempted to institute a program called "Prosper," which assigned costs on a product-by-product basis, but had discontinued it prior to the relevant time period. Dr. Marvin Hayenga, an agricultural economist, also testified for Red Owl. He stated that there were a number of methods of allocating cost. It was his opinion that, because dairy products have a high turnover rate, a lower percentage of overhead costs should be allocated to them.

The hearing examiner found that the cost of doing business with regard to the dairy products could be approximated by allocating a percentage to those products based on their percentage of total store sales. He concluded that Red Owl had sold dairy products below cost, with the purpose of or with the effect of restraining, lessening or destroying competition, in violation of the Dairy Act. The commissioner, adopting the hearing examiner's findings, ordered respondent to cease and desist from further violations.

In determining that the sales made by Red Owl were below cost, the commissioner applied the definition of cost which is

referred to by the Dairy Act and which is set forth in Minn. Stat. § 325.01, subd. 5 (1978),[2] as follows:

> The actual current delivered invoice or replacement cost, whichever is lower, without deducting customary cash discounts, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business at that location by the vendor;
>
> * * * * *

The term "customary cash discounts" means "any allowance, not exceeding two percent, whether a part of a larger discount or not, made to the wholesale or retail vendor, where the wholesale or retail vendor pays for merchandise within a limited or specified time." Minn. Stat. § 325.01, subd. 6 (1978).

Red Owl asserts that a definition of cost which fails to provide for the deduction of cash discounts forces an overstatement of costs each time a retailer receives such discounts. It argues that, by disregarding cash discounts, the Dairy Act is arbitrary, discriminatory and a violation of due process. However, Red Owl notes that in these cases the commissioner and the hearing officer did, in fact, deduct the discounts in determining costs.

---

[2] The relevant provision of the Dairy Act, Minn. Stat. § 32A.04, subd. 1(o) (1978), provides in part:

> No manufacturer, wholesaler, distributor or retailer of a selected dairy product engaged in business within this state shall sell, offer for sale or advertise for sale any selected dairy product *below "cost" as that term is defined in section 325.01* or give, offer to give, or advertise the intent to give away any selected dairy product for the purpose or with the effect of violating sections 32A.04, 32A.06, 32A.07, 325.03, and 325.06. (Emphasis added.)

Any further references to the Dairy Act shall relate to this provision as well as section 325.01, which is incorporated by reference.

We recognize that courts are divided on the issue of whether fair trade statutes, such as the Dairy Act, which exclude deductions for cash discounts, are violative of due process. *Compare Cohen v. Frey & Son,* 197 Md. 586, 80 A.2d 267 (1951), *with Dikeou v. Food Distributors Ass'n.*, 107 Colo. 38, 108 P.2d 529 (1940). We need not and do not decide the issue, however, because the act was not applied on that basis. Since Red Owl benefited from the deduction of cash discounts, it cannot now complain that such discounts are not allowed under the terms of the statute.

The commissioner determined that "cost" in this case was equal to the invoice price increased by approximately 20%, which it estimated was Red Owl's "cost of doing business." Minn. Stat. § 325.01, subd. 7 (1978), defines the "cost of doing business" or "overhead expense" as follows:

> The "cost of doing business" or "overhead expense" is defined as all current costs of doing business incurred in the conduct of such business and must include, without limitation, the following items of expense: Labor, including salaries and bonuses of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising, and other fixed and incidental expenses.

The hearing examiner found that the commissioner's method of calculating the "cost of doing business," which was based on the ratio of the total store expenses to the total store sales, was reasonable.

It is Red Owl's contention that this procedure was arbitrary and not supported by the statute, because it was not specifically related to the cost of dairy products as opposed to other grocery items. It asserts that cost should be allocated on a product-by-product basis. Since it, like the commissioner,

considers this method to be too difficult to be practicable, it contends that the Dairy Act is discriminatory and a denial of due process.

We are not convinced that the term "cost of doing business" is so vague as to be completely impractical. The Dairy Act does not require that the cost must be absolutely exact. *Dikeou v. Food Distributors Ass'n,* 107 Colo. at 45-46, 108 P.2d at 533. All that the statute requires is a cost figure arrived at by reasonable accounting standards. *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 440, 446 P.2d 958, 964 (1968). The commissioner's method appears to be a reasonable, and an enforceable, way of allocating overhead costs to an item, especially in view of the fact that many costs, such as salaries, cannot be tied directly to any particular item. Although Red Owl's expert testified to a number of methods of cost allocation, he agreed that the commissioner's allocation of overhead could be a reasonable method. Red Owl concedes that an attempt to allocate costs on an individual basis is practically impossible, and, indeed, it discontinued its "Prosper" program which was based on that system. Its own accounting method, in fact, sets forth expenses as a percentage of sales.

The term "cost of doing business" is therefore sufficiently clear to require compliance with its provisions. *See State v. Langley,* 53 Wyo. 332, 84 P.2d 767 (1938). The constitutionality of the Dairy Act should not depend on questions of inconvenience or difficulty in application of a cost standard. *McElhone v. Geror,* 207 Minn. 580, 292 N.W. 414 (1940); *People v. Kahn,* 19 Cal. App. 2d 758, 60 P.2d 596 (1936). The act is not so vague and indefinite that it violates the substantive requirements of the due process clauses of the Minnesota and federal constitutions.

In determining that the statute is constitutional, it is not our role to decide whether the Dairy Act is sound policy or whether it appropriately balances the interest of consumers in low prices and the interest of vendors in fair prices. As the United States Supreme Court recently noted in *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981), it is the role of the legislature to decide the wisdom and utility of this type of legislation. If the question is at least debatable, this court may not substitute its judgment for that of the legislature.

Red Owl argues that the reason for the enactment of the Dairy Act, the mitigation of the hazards of aggressive price competition, no longer exists. However, in *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 149 N.W.2d 698 (1967), this court found that the rationale was still valid. We there noted:

> The practice of advertising and selling "loss leaders," or what have been sometimes described as loss "misleaders," has been found by legislatures to result in financially strong companies driving weaker competitors out of business, thereby opening the door to the monopolies which the law is designed to prevent. * * * A further justification for the statute is the likelihood of deception arising from the public's notion that if one item is sold below cost others will be equally cheap, whereas they may actually be exorbitantly high.

Id. at 229, 149 N.W.2d at 701-02 (footnotes omitted).

The American enterprise system, of course, encourages vigorous competition for patronage as a good for both retailers and consumers. However, the legislature, as a matter of economic regulation, may constitutionally draw the line beyond which certain competitive practices are deemed inimical to a

greater public interest. Thus, the conclusion of the legislature that predatory price wars are contrary to the interests of the public and that temporary price advantages may lead to monopoly by large chains is not so irrational as to be contrary to the law or the constitution. *See Flank Oil Co. v. Tennessee Gas Transmission Company*, 141 Colo. 554, 349 P.2d 1005 (1960).

It is also Red Owl's position that the commissioner's decision that it made sales below cost for the purpose or with the effect of injuring competition is not supported by the evidence. It notes that the district court held that the evidence failed to provide a prima facie showing that sales were made by Red Owl below cost with the purpose of destroying competition.

Since we are reviewing the order of an administrative agency, an independent examination of the agency's decision may be conducted by this court without according special deference to the same review conducted by the district court.[3] *Amdahl v. County of Fillmore*, 258 N.W.2d 869 (Minn. 1977); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977). Our judgment concerning inferences to be drawn from the evidence should not be substituted for that of the agency. *Ellis v. Minneapolis Commission on Civil Rights*, 295 N.W.2d 523 (Minn. 1980). If the record, however, when considered in its entirety does not contain substantial evidence supporting an administrative decision, the agency's ruling must be modified or reversed. *Quinn Distributing Company v. Quast Transfer, Inc.*, 288 Minn. 442, 181 N.W.2d 696 (1970).

---

[3] The district court must consider the findings of the commissioner in cases under chapter 32A to be conclusive as to the facts if supported by the evidence in the proceedings. Minn. Stat. § 32A.09, subd. 5(b) (1978).

There is substantial evidence to support the commissioner's determination that sales were made below cost. The fact stipulation shows that the sum of store and allocated expenses as a percentage of sales is 20.03%, approximately the same percentage which was used by the commissioner as the cost of doing business when he calculated the cost of selected dairy items. This stipulation was based on the operating statement prepared by Red Owl. Although Red Owl now claims that the operating statement was used for internal purposes and is not related to cost of doing business, the statement is the best indication of Red Owl's own cost analysis. In addition, Mr. Thimmesh, director of the Dairy Practices Division, indicated that retailers commonly allocate costs on a basis of percentage of sales.

Red Owl contends that the commissioner's estimation of the cost of doing business, based on a store-wide percentage of sales, is unreasonable when applied to dairy products. It asserts that because the velocity, or turnover, of dairy items is five times that of grocery items,[4] a store-wide percentage cost is considerably higher than the cost associated with dairy items.

Red Owl's argument regarding the velocity of dairy products bootstraps the issue. The lower the price, the higher the velocity. If Red Owl continued to lower prices, it could eventually claim its overhead cost with respect to these products was negligible, which would render the cost of doing business meaningless. There are also a number of expenses, such as refrigeration and labor, which offset the benefits gained from

[4] This figure was arrived at by Dr. Hayenga by dividing the 75 times per year turnover rate of dairy products by the 17 to 19 times per year turnover rate of other grocery items. He assumed that all other costs remained the same but noted that, in reality, they probably would change, also.

higher velocity. Thus, the hearing examiner's finding that sales were made below cost, as determined by the commissioner, does not lack evidentiary support.

In order for the commissioner to establish a violation under the Dairy Act, there must not only be sales below cost, but they must be with the purpose or with the effect of restraining, lessening or destroying competition or injuring a competitor. Minn. Stat. § 32A.04, subd. 1 (1978), provides in part: "Proof that any person has engaged in any of the trade practices or methods of doing business described in this section shall be prima facie evidence of an intent to violate or that it has the effect of violating the provisions of this section." This prima facie rule does not shift the burden of proof from the commissioner but it does shift the burden of going forward to Red Owl, since the statute creates a presumption that any sale below cost is done with the prohibited purpose or effect. *State v. Ross*, 259 Wis. 379, 48 N.W.2d 460 (1951). Once Red Owl produced its evidence, the commissioner assumed the ultimate burden of proving the violation. *See Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 149 N.W.2d 698 (1967).

There must be substantial damage to the competitive atmosphere of a retailer's trade area or to a competitor in order to show that there was an intent or effect of injuring competition or a competitor. *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957). The testimony of grocers that they have lost business to the retailer may be sufficient evidence of injury to competitors. *See People v. Gordon*, 105 Cal. App.2d 711, 234 P.2d 287 (1951).

In *State v. Applebaums Food Markets, Inc.*, 259 Minn. 209, 106 N.W.2d 896 (1960), we decided that no showing had been made that sales below cost were for the purpose or ef-

fect of injuring a competitor. The only evidence introduced, however, consisted of affidavits of grocers stating that below cost sales by chain stores generally hurt independent stores. Only one affidavit indicated that the grocer had suffered a percentage drop in business, and no affidavit indicated that the grocer operated a store in the vicinity of any store operated by the defendant or that he had been injured by the defendant.

In this case, Marvin Babcock, who eventually became bankrupt, testified that he had operated a grocery store in Fairmont and that his sales had decreased dramatically during the time that Red Owl had advertised the specials. Babcock indicated that Red Owl's promotion had an effect on his financial condition. Michael Whitman, another Fairmont grocer, testified that he had suffered a loss in his milk business during the period of Red Owl's advertised specials and that many of his customers who were lured away at that time never returned. Evidence was also introduced at trial showing that during the time of the reduced prices, Red Owl had gained an increase in the market share and was able to retain a percentage of these customers after it increased prices.

We conclude that there is strong evidence establishing the diminution of competition as a result of Red Owl's promotions. Further, because the dairy products were "staple" items, and not items that one "stocks up" on, Red Owl cannot argue that the purpose of reduced prices was to increase sales of milk generally in the marketplace. As evinced by its actions, Red Owl's purpose was to increase its own share of the market at the expense of other retailers.

We hold that the decision of the commissioner, based on the hearing examiner's finding that Red Owl sold below cost

with the purpose or effect of injuring a competitor or destroying competition, is not without requisite evidentiary support. The order of the district court vacating the commissioner's order is accordingly reversed, and the commissioner's decision ordering Red Owl to cease and desist from further violations of sales below cost as prohibited by Minn. Stat. § 32A.04, subd. 1(o) (1978), is hereby reinstated.

Reversed.

State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

D. C. File No. 757948

RED OWL STORES, INC.,

Petitioner,

vs.

COMMISSIONER OF AGRICULTURE,

Respondent.

ORDER

The above-entitled matter came on before the undersigned, one of the Judges of the above named Court, on the 2nd day of July, 1980, on the Motion of Respondent for Amended Findings in Courtroom 1656, Hennepin County Government Center, City of Minneapolis, County of Hennepin and State of Minnesota.

Phillip Gainsley, Esq. appeared for and on behalf of Respondent and in support of its Motion. Curtis D. Forslund, Esq. appeared for and on behalf of Petitioner and in opposition thereto.

The Court, having read the memoranda of counsel and having heard the arguments of counsel, and upon the Court's Minutes, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Respondent's Motion is, in all respects denied.

By the Court:
IRVING C. IVERSON
Judge of District Court

Dated: July 8, 1980.

(Caption)

MEMORANDUM DECISION

The above-entitled matter came on for trial before the undersigned, Judge of District Court, on February 29, 1980, as an appeal from the Final Order of the Commissioner of Agriculture of the State of Minnesota.

Curtis Forslund, Esq., appeared for and on behalf of the Petitioner. Phillip Gainsley, Esq., appeared for and on behalf of the Respondent.

The briefs of counsel are replete with Minnesota case law and opinions of the Attorney General of Minnesota that have attempted to salvage Minnesota Statute §325.04 from the history of attacks by opponents asserting its unconstitutionality. After much consideration, the Court here is in agreement with the position of Petitioner Red Owl that the time has come for the Court to pronounce the constitutional pitfalls of §325.04 governing "selling below cost"; the statute as it now reads is arbitrary, discriminatory, and fails to comport with reality.

In particular, §325.04 is dependent on a spurious definition (in §325.01(5)) of its most basic component—"cost":

> "The actual current delivered invoice or replacement cost, whichever is lower, *without deducting customary cash discounts*, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business at that location by the vendor; . . ."

The above statutory definition serves to punish the buyer who elects to pay timely with cash on the table, for the savings he makes by avoiding lengthy credit arrangements are never figured into the Commissioner's calculation of his cost. Though the definition may be convenient and definite, it ignores market reality by overstating cost in some instances. The result is that a merchant may be sanctioned arbitrarily and discriminatorily.

Efforts to preserve the statute by either artful construction or corrective application ignore basic precepts governing the constitutional validity of any statute. An arbitrary statute is not rendered less offensive by a rewriting of its clear meaning. Nor is it made valid because the discriminatory effect is rare or somehow limited. It is no consolation that in determining "cost", §325.04 does account for the portion of cash discounts in excess of 2%; the 2% margin alone creates error in the finding of cost. And merely labeling the cash discount as "financial income" distinct from cost does not alter the reality, particularly in a highly competitive market, that discounts affect the cost of merchandise.

Finally, since the cash discount provision of §325.04 (and §325.01) is clear and unqualified, no ambiguity is present that calls for judicial construction by an administrative agency or this Court. Any attempt to save the statute by

deleting its plain language is an invasion of the exclusive role of the legislature.

The apparent concern of the legislature in "selling below cost" legislation is the harmful effect on the market resulting from price manipulation which interferes with competition. For this policy to retain any integrity, only those merchants who are shown in fact to be selling below their actual cost should be subject to sanction. And just as the merchant's cost for any given product may be influenced by discount financing, it may also be influenced by the unique aspects of the "cost of doing business" for each product.

The Commissioner's formula for measuring the cost of doing business is defective in that an average figure is used for all products sold by any one merchant, ignoring the reality that different products have different overhead costs. While such an averaging figure is convenient to determine and administer, it may arbitrarily lead to enforcement against those merchants who manipulate price on items with minimal overhead and complacence with those merchants who manipulate price on items with major overhead expenses, regardless of whether the merchant is actually selling below his marginal cost for the specific item.

In the instant case, Red Owl asserts (page 18, Petitioner's Reply Brief) that under at least one method of allocating the cost of doing business on a per item basis, "none of the sales at issue . . . were below cost". The briefs of both parties contain lengthy discussion of whose burden it is to make such a showing. Without question the administrative agency has the burden of presenting a prima facie case that the particular item in question is being sold under the cost reasonably attributable to that item. Modern discovery allows ample means and opportunity to gather information sufficient to

make such a showing. However, a prima facie showing of this sort was never made by the Commissioner in this case.

A further issue remains: whether the Commissioner's burden includes the obligation to make a prima facie showing of the statute's second element, "intent or effect of harming competition", or alternatively, that a showing of the first element, "selling below cost", alone serves as prima facie evidence of harm to competition. A related question concerns the level of harmful intent or effect that is contemplated by the statute. Since there has been no prima facie showing of "selling below cost", these remaining questions are properly left for another date.

IT IS HEREBY ORDERED:

1. That the Final Order of the Commissioner of Agriculture is hereby vacated.

2. That the amended complaint of the Commissioner of Agriculture, Complainant, is hereby dismissed.

3. That Petitioner, Red Owl, is hereby awarded reasonable costs and attorney's fees to be determined upon subsequent Motion by Petitioner.

4. That counsel for Red Owl Stores, Inc. shall submit Findings in conformity with this Memorandum Decision.

By the Court:
IRVING C. IVERSON
Judge of District Court

Dated: May 19, 1980.

(Caption)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on for trial before the undersigned, Judge of District Court, on February 29, 1980, as an appeal from the Final Order of the Commissioner of Agriculture of the State of Minnesota.

Curtis Forslund, Esq., Gray, Plant, Mooty, Mooty & Bennett, 300 Roanoke Building, Minneapolis, 55402, appeared for and on behalf of the Petitioner. Phillip Gainsley, Esq., 920 F & M Bank Building, Minneapolis, Minnesota, 55402, appeared for and on behalf of the Respondent.

On all the files and proceedings herein, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

Findings of Fact

1. This matter involves two Complaints issued by the Commissioner of Agriculture which were consolidated for hearing. Both Complaints alleged that Red Owl Stores, Inc. violated the provisions of the Minnesota Dairy Industry Unfair Trade Practices Act, Minn. Stat. Ch. 32A (the "Act"). In particular, the Commissioner contended that Red Owl Stores engaged in unfair trade practices under section 32A.04 Subd. 1.0., which provides in pertinent part:

> No . . . retailer of a selected dairy product engaged in business within this state shall sell, offer for sale or advertise for sale any selected dairy product below "cost" as that term is defined in section 325.01 . . . for the purpose or with the effect of violating sections 32A.04, 32A.06, 32A.07, 325.03, 325.04, and 325.06.

The Commissioner's only allegation was that Red Owl Stores has violated section 32A.04. The only portion of section 32A.04 which is at issue here is selling below cost (as defined by the Act) for the purpose or with the effect of restraining, lessening or destroying competition or injuring one or more competitiors.

2. The definition of "cost" is found in Minn. Stat. §325.01 (5), which provides that "cost" is:

> The actual current delivered invoice or replacement cost, whichever is lower, *without deducting customary cash discounts*, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business at that location by the vendor; . . . . (Emphasis added.)

This definition of "cost" is arbitrary and discriminatory, and serves to punish the buyer who elects to pay timely with cash on the table. To ignore cash discounts is to ignore market reality. Although the Commissioner elected to calculate Red Owl's "cost" by ignoring the statutory directive that cash discounts not be deducted, this attempted construction of the statute by the administrative agency is a departure from the plain language of the statute and is an invasion of the exclusive role of the legislature. The Commissioner's decision to ignore a portion of the statute cannot avoid its clear unconstitutionality.

3. The cost of doing business in a retail grocery store (excluding cost of goods sold) is comprised of a large number of separate expenditures, including among others: wages and salaries, rent, utilities, employee benefits, taxes, repairs, administrative expense and warehouse expense. Not all of these individual expenditures are applicable to every item in the store. For example, warehouse costs are not applicable to the selected dairy products at issue in the instant case because milk and ice cream are not stored in the warehouse. Even the expenditures which are applicable to selected dairy products as well as other products in the store are not applicable in uniform amounts. That is, as one example, even though both selected dairy products and meat have salary costs associated with them, meat requires more, and higher

paid, labor than selected dairy products so that it consumes more salary expense than selected dairy products. As another example, the time required for such activities as stocking the cooler, marking prices and ringing the price on the cash register is less for the selected dairy products at issue here than for other products because of the rate at which they are sold and the use of a "price lookup code" on the package. These factors mean that each individual product in a grocery store has a different cost of doing business associated with it.

4. The expenditures which comprise the cost of doing business in a grocery store may be classified as fixed and variable. Fixed costs are those that do not change as the volume of goods sold changes. Variable costs are those that do change as the volume of goods sold changes, although the change in cost is often not in a one-to-one relationship with the change in volume. The sum of the fixed and variable costs for a store is the total cost of doing business for the store as a whole. Thus, not only does each selected dairy product have a cost of doing business associated with it which is different from every other product, but, because many of the expenditures required to operate a grocery store are fixed, the cost of doing business for each unit of any selected dairy product goes down as the rate at which the product is sold goes up. A clear example of this decrease in unit cost is seen in the effect of increased velocity upon space related costs. The rate at which a product is sold is called its velocity or turnover. The velocity of selected dairy products increases when they are sold as an advertised special. The per square foot rental cost of the store, the insurance costs, and the utility cost for running the cooler are all fixed costs. If, for example, these fixed costs total $10.00 for the portion of the dairy case devoted to the selected dairy products at issue

and in an ordinary week 200 units are sold through that space, then the cost per unit is $.05. During a week when the selected dairy product was an advertised special, the fixed costs, to illustrate, remained at $10.00, but the volume virtually doubled, to, say 400 units, and thus the per unit cost dropped to $.025.

5. Although different products in the store actually have different costs of doing business associated with them, the only evidence introduced by the Commissioner relating to the cost of doing business for selected dairy products was a showing that the percentage margin on the selected dairy products at issue was less than the percentage which *overall* store expenses bore to *overall* store sales on a yearly basis. In other words, the Commissioner claimed that because the *average* cost for all products in the store on a yearly basis was a certain percentage of sales the cost of doing business for the selected dairy products at issue was that same percentage, regardless of the velocity of the selected dairy product during the advertised special and irrespective of the fact that, in reality, the cost of doing business for selected dairy products actually is not equal to that average.

6. Although for some purposes overall store expenses may be expressed as a percentage of overall store sales, and although this calculation is contained in Red Owl's store operating statements where it is useful to management for making comparisons between stores, this average calculation is neither meaningful nor useful in determining the actual cost of doing business associated with selling any particular selected dairy product. Moreover, overall store expenses expressed as a percentage of overall store sales is not a valid or reasonable approximation of the cost of doing business of the selected dairy products at issue here. It is an average of all products and nothing more.

7. Red Owl's cost of doing business for the selected dairy products in question was far less than the average percentage used by the Commissioner. The process of calculating the actual cost of doing business for a particular product is extremely complex requiring sophisticated industrial engineering. These techniques are not utilized by Red Owl on any regular basis; however, both Mr. Paul Nelson of Red Owl and Professor Marvin Hayenga, an Agricultural Economist, testified as to the true cost of the selected dairy products at issue. It is possible to make a profit at a margin of eight percent or less, as testified by Mr. Nelson. Professor Hayenga's calculation allocating costs to selected dairy products of between two and four percent, working from the calculation of average cost for all products and taking into account the unique characteristics of space utilization and velocity of selected dairy products, is a reasonable approximation of the real cost of doing business for selected dairy products. The storewide average is not reasonably related to the real costs. With the exception of the products sold at Owatonna the selected dairy products at issue were not sold below cost.

8. The sour cream and cottage cheese at issue in Owatonna were sold below cost. This fact was conceded by Petitioner's counsel at the administrative hearing. However, Red Owl did not make the sales for the "purpose of . . . restraining, destroying or lessening competition or injuring a competitor." The sales were made at the below-cost price as the result of a mistake on the part of the store manager in failing to correctly read and follow the prices authorized by Red Owl's home office. Also, the small number of sales involved and the isolated nature of the occurrence make the effect of the sales on either competition or competitors wholly inconsequential and devoid of injurious consequence.

II.

CONCLUSIONS OF LAW

1. Minn. Stat. §325.01(5) on its face is contrary to the due process clause of Article I, Section 7 of the Minnesota Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The evidence fails to provide a *prima facie* showing that Red Owl Stores sold any selected dairy product below cost, except for the sales of sour cream and cottage cheese at the Red Owl Store in Owatonna, and those sales were not made for the purpose of or with the effect of injuring a competitor or destroying competition.

3. Subsequent to the Court's Memorandum Decision of May 19, 1980, the Supreme Court in *Minnesota-Iowa Television Co. vs. Watonwan T.V. Improvement Association*, —— N.W.2d ——, "Finance and Commerce", May 30, 1980, page 15, has clarified the issue of whether attorneys' fees are recoverable in this proceeding. The Court has concluded that Red Owl Stores, Inc. is not entitled to attorneys' fees, and this conclusion stands as a modification to the Court's prior Memorandum Decision.

In all other respects the Court's Memorandum Decision of May 19, 1980, is herewith incorporated in these Findings of Fact and Conclusions of Law.

By the Court:

IRVING C. IVERSON

District Court Judge

June 13, 1980.

STATE OF MINNESOTA
DEPARTMENT OF AGRICULTURE

File No. AG-76-007-MG

COMMISSIONER OF AGRICULTURE,
Complainant,

v.

RED OWL STORES, INC.,
Respondent.

FINAL ORDER

Based upon the Findings of Fact, Conclusions of Law, Recommendation, and Memorandum of Myron S. Greenberg, Hearing Examiner, dated November 28, 1978, in the above-entitled matter which are attached hereto as Exhibit "A" and made a part hereof, and upon the Transcript of the Hearings before the Hearings Examiner and upon the arguments of counsel before Deputy Commissioner of Agriculture Rollin M. Dennistoun on the 15th day of March, 1979,

IT IS HEREBY ORDERED:

1. That the report of Hearing Examiner dated November 28, 1978 be, and the same hereby is, adopted as and for the Findings of Fact, Conclusions of Law and Memorandum of the Department of Agriculture.

2. That respondent shall cease and desist forthwith from further violations of the sales below cost prohibitions of Minnesota Statutes § 32A.04, Subd. 1(o) (1978).

Dated at Saint Paul, Minnesota, this 26th day of June, 1979.

ROLLIN M. DENNISTOUN
Deputy Commissioner
Department of Agriculture
State of Minnesota

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
FOR THE DEPARTMENT OF AGRICULTURE

COMMISSIONER OF AGRICULTURE,

Complainant,

vs.

RED OWL STORES, INC.,

Respondent.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Myron Greenberg on August 14, 1978 at the Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota. The Complainant appeared through Phillip Gainsley, Esq., Special Attorney; and the Respondent appeared through Curtis D. Forslund, Esq., and Thomas Darling, Esq.

Notice is hereby given that, pursuant to Minn. Stat. § 15.-0421 (1976), the final decision of the Department of Agriculture shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Department. Exceptions to this Report, if any, shall be filed with the Commissioner of Agriculture, with copies to Mr. Gainsley and Mr. Robert Thimmesh, Director of the Dairy Practices Division of the Department of Agriculture.

Based upon the proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On June 1, 1976, the original complaint was issued by then Commissioner of Agriculture Jon Wefald, pursuant to Minn. Stat. § 32A.09. That complaint was amended on June 9,

1976. Respondent answered the Complaint on June 22, 1976. Another complaint, Department of Agriculture Docket No. 76-294, was issued by Commissioner Wefald on August 20, 1976.

Respondent moved to dismiss the Complaint in Docket No. 76-128 on September 8, 1976 and supported its motion by a Memorandum of the same date. That motion was followed by Complainant's Reply Memorandum dated October 21, 1976, and Respondent's further response of November 1, 1976. At the first Prehearing Conference on November 2, 1976, and by Order dated November 10, 1976, the two Complaints were consolidated for a single hearing. By the same Order, the Examiner denied Respondent's motion to dismiss. That ruling is hereby certified to the Commissioner of Agriculture for review and consideration.

After extensive time was allowed for discovery, a second Prehearing Conference was held on June 8, 1978. The Prehearing Order issued on June 12, 1978 established guidelines for presentation of the parties' respective cases and their burden of proof.

At the time of the second Prehearing Conference (June 8, 1978), the parties executed an extensive Stipulation of Facts. (Comm. Ex. 1)

Subsequent to the conclusion of the hearing on August 15, 1978, briefs and proposed findings were submitted to the Hearing Examiner, the last of such documents being received on October 18, 1978.

2. On August 15, 1978, Respondent moved the Examiner to determine the constitutionality of the Dairy Industry Unfair Trade Practices Act (Minn. Stat. Ch. 32A). That motion is hereby denied as beyond the authority and jurisdiction of the Hearing Examiner. Relief on grounds of unconstitutionality

may be obtained only through the court system of this state, not through the administrative contested case procedure.

3. Respondent is a grocery retailer of "selected dairy products" as that term is defined by Minn. Stat. § 32A.03.

4. Complainant had reason to believe that Respondent violated some of the provisions of Minn. Stat. §§ 32A.01 to 32A.-09, and particularly § 32A.04, subd. 1(o), and it appeared to him that a proceeding in respect thereof was warranted.

5. The term "cost of doing business" as used herein is defined by Minn. Stat. § 325.01, subd. 7.

Respondent allocated its corporate cost of doing business to each individual store on the basis of each store's percentage share of total corporate sales. Respondent also allocated each store's cost of doing business to each department in the store on the basis of the department's percentage share of the total store sales, and has been using this percentage-of-sales method to allocate both corporate costs of doing business and individual store costs of doing business during the relevant time period.

A reasonable, though not exclusive, method of allocating Respondent's cost of doing business to the dairy products at issue is a percentage of sales, i.e., the cost of doing business for the products at issue may be allocated to said products based upon the products' percentage of total sales.

During all times relevant hereto, the cost of doing business, expressed as a percentage of sales for Respondent's stores involved in this proceeding, was as follows, to-wit:

Store	Percent
Fairmont	23.65%
Stillwater	19.49%
Twin Cities	22.78%
St. Cloud (Waite Park)	20.03%
St. Cloud (St. Germaine)	20.09%

The Stipulation signed by Respondent establishes as fact the percentages set forth above. They are the only figures noted in the record as a means by which to establish a definite cost for each item cited as violating the provisions of the Act. Although arguments were made in hearing and in post-hearing submissions that some other figures or methods should be applied to determine the overhead expense associated with each selected dairy products, no evidence was proffered to establish such an alternative or its applicability to the cited violations. The Examiner, therefore, must accept and apply that which the parties established by their execution of the Stipulation of Facts.

The cost of doing business with respect to selected dairy products is not substantially different from the cost of doing business with respect to other items sold by Respondent. In addition to some costs allocated to non-dairy products, dairy products require cooling or freezing which generate additional costs to Respondent.

While frequently the supplier of the dairy products is responsible for the handling of milk, ice cream, and other items, Respondent's respective store managers or dairy managers must involve themselves in the delivery of the particular product to the store and the movement from the storage cooler to the display cooler. Dairy products are not warehoused, but in lieu of warehousing, there is still on-location storage on the site of Respondent's respective stores. Also, cooling and freezing have certain inherent maintenance costs. While dairy products' "turn-over" is faster than other products, such turnover does not substantially reduce Respondent's per unit cost of doing business with regard to the particular products involved in these actions.

Respondent does not attempt to distinguish between the cost of doing business with respect to selected dairy products and the cost of doing business with respect to other items. Respondent's business is based in part on the amount of its margin and in part on the quantity it can sell of a given product.

6. During all relevant times hereto, when Respondent placed its advertisements or made its offers to sell, its intention was to demonstrate to the consumer its lower-than-usual retail prices on the respective products.

7. Respondent's sales of milk and ice cream substantially increased in those periods in which it advertised, offered and sold such products below cost, and these increased sales were caused by Respondent's advertisements, offers and sales below cost.

8. The selected dairy products which are the subject matter of this proceeding, especially the various grades of milk, are "staple" or basic items, as are, for example, bread, ground beef, Miracle Whip and tissue. When these items are advertised, they are generally advertised with a retail price. There is generally an increase in sales of selected dairy products when they are promoted through advertising, and such advertisements create traffic in Respondent's respective stores. When the prices of the selected dairy products involved in these actions are not being sold at a reduced retail price, Respondent does not advertise them. Conversely, when Respondent advertises these particular selected dairy products, it does so only with a reduced price mentioned in the respective advertisements.

During all times relevant hereto, the selected dairy products referred to in the Complaint herein were items generally accepted by the consumer.

9. In Respondent's Fairmont, Minnesota, store during the week ending August 16, 1975, the delivered cost to it of 1% milk in one-gallon containers was the sum of $.9635 per gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business is approximately 23¢ per gallon, which amount, when added to the delivered cost, is a total cost of $1.19. Respondent, however, on August 12, 1975, advertised for sale, and during the week ending August 16, 1975, offered for sale and sold 1% milk in one-gallon containers for $1.05 per gallon, which retail price is below Respondent's cost.

During the week ending October 11, 1975, Respondent's delivered cost to it in Fairmont of 1% milk in one-gallon containers was the sum of $1.0206 per gallon, and as indicated above, its cost of doing business, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business was approximately 24¢ per gallon, which amount, when added to the delivered cost is a total cost of $1.26. Respondent, however, on October 7, 1975, advertised for sale, and during the week ending October 11, 1975, offered for sale and sold 1% milk in one-gallon containers for $1.11 per gallon.

During the week ending August 9, 1975, the delivered cost to Respondent in Fairmont of homogenized milk in one-gallon containers was $1.0546, and as indicated above, the cost of doing business, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business was approximately 25¢ per gallon; and the purchase price of $1.0546, plus Respondent's cost of doing business of 25¢ equals $1.30. Respondent, however, on August 5, 1975, advertised for sale, and during the week ending August 9, 1975, offered for sale and sold homogenized milk in one-gallon containers for $1.15 per gallon.

During the week ending July 26, 1975, Respondent's delivered cost to it in Fairmont of 2% milk in one-half gallon containers was the sum of $.5082 per half gallon, and as indicated above, its cost of doing business, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business was approximately 12¢ per half gallon, which amount, when added to the delivered cost, is a total cost of approximately 63¢. Respondent, however, on July 22, 1975, advertised for sale, and during the week ending July 26, 1975, offered for sale and sold 2% milk in one-half gallon containers for a retail sale price of 57¢ per half gallon.

During the week ending August 23, 1975, the delivered cost to Respondent in Fairmont of 2% milk in one-half gallon containers was the sum of $.5155 per half gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business is approximately 12¢ per half gallon, which amount, when added to the delivered cost, is a total cost of 64¢. Respondent, however, on August 19, 1975, advertised for sale, and during the week ending August 23, 1975, offered for sale and sold 2% milk in one-half gallon containers for a retail sale price of 57¢ per half gallon.

During the week ending August 2, 1975, Respondent's delivered cost to it in Fairmont of skim milk in one-gallon containers was the sum of $.8775 per gallon, and as indicated above, its cost of doing business, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business was approximately 21¢ per gallon, which amount, when added to the delivered cost, is a total cost of $1.09. Respondent, however, on July 29, 1975, advertised for sale, and during the week ending August 2, 1975, offered for sale and sold skim milk in one-gallon containers at an actual retail selling price of $.98 per gallon.

During the week ending August 2, 1975, Respondent's delivered cost to it in Fairmont of skim milk in one-half gallon containers was the sum of $.4495 per half gallon, and as indicated above, its cost of doing business, expressed as a percentage of sales, was 23.65%. The monetary amount for the cost of doing business was approximately 11¢ per half gallon, which amount, when added to the delivered cost, is a total cost of 56¢. Respondent, however, on July 29, 1975, advertised for sale, and during the week ending August 2, 1975, offered for sale and sold skim milk in one-half gallon containers for 50¢ per half gallon.

10. During the week ending June 5, 1976, in Owatonna, Minnesota, Respondent advertised for sale, offered for sale, and sold 24-ounce containers of a dairy product called "Slim N' Trim", 16-ounce containers of sour cream and 24-ounce containers of cottage cheese, all at retail selling prices below Respondent's cost. These advertisements, offers and sales were the result of good faith errors, and Respondent took steps within a resasonable time to correct those errors.

11. In Respondent's St. Cloud-Waite Park store during the weeks ending April 4, May 3 and June 7, 1975, the delivered cost to it of 1% milk in one-gallon containers was the sum of $.8710 per gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.03%. The monetary amount for the cost of doing business is approximately 17¢ per gallon, which amount, when added to the delivered cost, is a total cost of $1.04. Respondent, however, on March 29, April 26 and May 31, 1975, advertised for sale, and during the weeks ending April 5, May 3 and June 7, 1975, offered for sale and sold 1% milk in one-gallon containers for an actual retail sale price of 99¢.

During the weeks ending August 9 and September 13, 1975, the delivered cost to Respondent in its St. Cloud-Waite Park store of 1% milk in one-gallon containers was the sum of $.9592 per gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.03%. The monetary amount for the cost of doing business is approximately 19¢ per gallon, which amount, when added to the delivered cost, is a total cost of $1.15. Respondent, however, on August 2, and September 6, 1975, advertised for sale, and during the weeks ending August 9 and September 13, 1975, offered for sale and sold 1% milk in one-gallon containers at an actual retail price of 99¢.

In Respondent's St. Cloud-Waite Park store during the week ending September 27, 1975, the delivered cost to it of "Nice N' Light" 1% milk in one-half gallon containers was the sum of $.4451 per half gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.03%. The monetary amount for the cost of doing business is approximately 9¢ per half gallon, which amount, when added to the delivered cost, is a total retail price of 53¢. Respondent, however, on September 24, 1975, advertised for sale, and during the week ending September 27, 1975, offered for sale and sold "Nice N' Light" 1% milk in one-half gallon containers for the actual retail selling price of 49¢.

12. In Respondent's St. Cloud-St. Germaine store, during the weeks ending April 5, May 3, and June 7, 1975, the delivered cost to it of 1% milk in one-gallon containers was the sum of $.8710 per gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.09%. The monetary amount for the cost of doing business is approximately 17¢ per gallon, which amount, when added to the delivered cost, is a total retail price of $1.04.

Respondent, however, on March 29, April 26, and May 31, 1975, advertised for sale, and during the weeks ending April 5, May 3 and June 7, 1975, offered for sale and sold 1% milk in one-gallon containers for the actual retail sale price of 99¢.

During the weeks ending August 9, and September 13, 1975, the delivered cost to Respondent in its St. Cloud-St. Germaine store of 1% milk in one-gallon containers was the sum of $.9092 per gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.09%. The monetary amount for the cost of doing business is approximately 18¢ per gallon, which amount, when added to the delivered cost, is a total retail price of $1.09. Respondent, however, on August 2 and September 6, 1975, advertised for sale, and during the weeks ending August 9 and September 13, 1975, offered for sale and sold 1% milk in one-gallon containers for the actual retail sale price of 99¢.

In Respondent's St. Cloud-St. Germaine store during the week ending September 27, 1975, the delivered cost to it of "Nice N' Light" milk in one-half gallon containers was the sum of $.4451 per half gallon, and as indicated above, the cost of doing business of that store, expressed as a percentage of sales, was 20.09%. The monetary amount for the cost of doing business is approximately 9¢ per half gallon, which amount, when added to the delivered cost, is a total retail price of 54¢. Respondent, however, on September 24, 1975 advertised for sale, and during the week ending September 27, 1975, offered for sale and sold "Nice N' Light" 1% milk in one-half gallon containers for the actual retail selling price of 49¢.

13. On April 1, April 29, September 2, and October 8, 1975, Respondent advertised for its Stillwater, Minnesota store, and during the weeks ending April 5, May 3, September 6, and October 11, 1975, offered for sale at said store and sold five-

quart pails of ice cream, vanilla and flavored, for retail selling prices ranging from $1.89 to $2.29. Respondent's total delivered costs of from $1.6562 to $2.1854, plus the 19.49% factor for the cost of doing business in that store indicates that the retail selling prices were below Respondent's cost.

14. Respondent's stores in the greater Twin Cities' metropolitan area included, during all relevant times hereto, stores in the cities of Bloomington, Burnsville, Brooklyn Park, Coon Rapids, Edina, Excelsior, Fridley, Golden Valley, Hastings, Hopkins, Inver Grove Heights, Minneapolis, Minnetonka, Mound, New Hope, Richfield, Shakopee, St. Anthony, St. Louis Park, St. Paul, Stillwater, Wayzata, West St. Paul and White Bear Lake.

15. On July 3, July 10 and July 17, 1976, the cost to Respondent for each of its Twin Cities' stores of five-quart pails of vanilla ice cream was as follows, to-wit:

Store	7/3/76	7/10/76	7/17/76
Bloomington Store No. 49	$1.8914	$1.8914	$1.8914
Bloomington Store No. 50	1.9110	1.9208	1.9404
Bloomington Store No. 51	1.8914	1.9012	1.8914
Brooklyn Park	1.8914	1.9012	1.8914
Burnsville	1.9404	1.9306	1.9404
Coon Rapids	1.8914	1.8914	1.8914
Edina	1.8914	2.0678	1.8914
Excelsior	1.9012	1.8914	1.8914
Fridley	1.8914	1.9894	1.8914
Golden Valley	1.8914	1.9894	1.8914
Hopkins	1.8914	1.8914	1.8914
Inver Grove Heights	1.8914	1.8914	1.8914
Minneapolis-Henn. Ave.	1.9012	1.8914	1.8914
Minneapolis-W. Broadway	1.8914	1.9208	1.8914
Minneapolis-Cedar Ave.	2.0090	2.2246	1.8914

Minneapolis-S.E. 4th St.	1.8914	1.8914	1.8914
Minneapolis-E. Lake St.	1.9012	1.9012	1.9110
Minneapolis-3915 Nic. Ave.	1.9894	1.8914	1.8914
Minneapolis-Lyndale Ave.	1.9012	1.8914	1.8914
Minneapolis-Chicago Ave.	1.9404	1.9110	1.8914
Minneapolis-Drew Ave.	1.8914	1.8914	1.9012
Minneapolis-1816 Nic. Ave.	1.8914	1.9110	1.9110
Minneapolis-Chicago Ave.	1.9306	1.9208	1.9012
Minnetonka	1.8914	1.8914	1.8914
Mound	1.9110	1.8914	1.9012
New Hope	1.8914	1.9306	1.8914
Richfield	1.9208	1.9992	1.9012
Shakopee	1.9012	1.9110	1.9600
St. Anthony	1.9306	1.8914	1.9012
St. Louis Park	1.9012	1.8914	1.8914
St. Paul-Ford Parkway	1.8914	1.9502	1.8914
St. Paul-Grand Ave.	1.8914	1.9012	1.9012
St. Paul-Hudson Road	1.8914	1.8914	1.8914
St. Paul-No. Lexington	1.8914	1.9012	1.9012
St. Paul-Magnolia	1.8914	1.8914	1.9012
Stillwater	1.8914	1.9012	1.9012
Wayzata	1.8914	1.8914	1.8914
West St. Paul	1.8914	1.8914	
White Bear Lake-So. Lake	1.9306	1.9012	1.8914
White Bear Lake-Bellaire	1.8914	1.8914	1.8914

Respondent's cost of doing business in the foregoing Twin Cities' stores being 22.78% of sales, Respondent's break-even retail selling price for five-quart pails of vanilla ice cream should have been approximately $2.35. On June 27, July 4 and July 11, 1976, Respondent placed separate advertisements for the aforesaid ice cream, and during the weeks ending July 3, July 10 and July 17, 1976, Respondent offered for sale and

sold five-quart pails of vanilla ice cream for a retail price of $2.09, thereby selling, advertising and offering said pails of ice cream at 26¢ below cost.

16. The term "market share" or "share of the market" is defined as a percentage of the business available to a given retailer in a specific geographical area for a product or group of products.

17. The major manufacturers of vanilla ice cream during all relevant times hereto in the State of Minnesota were Marigold, Land O'Lakes and Northland, and while there may be other manufacturers of ice cream in the State of Minnesota, these other manufacturers did not sell their product in the Twin Cities during the relevant time.

18. During the weeks ending July 3, July 10 and July 17, 1976, Respondent's share of the market of five-quart pails of vanilla ice cream was, respectively, 34.11%, 29.63% and 26.79%. These percentages reflect a dramatic increase over the 13-week period immediately preceding these particular weeks, and further, over the same period in the year 1975. As Respondent's market share increased, its competitors' market share decreased, in the aggregate, and in particular, some of Respondent's competitors suffered the following loss of market share, to-wit:

Store	Average Weekly Share for 13 Weeks Before Violation Period	Average Weekly Share During Violation Period	Loss of Market Share
Country Club	22.13%	16.41%	5.72%
Penny's	9.73%	3.73%	6.00%
Cub Market	6.23%	2.25%	3.98%
Thriftway	2.49%	1.47%	1.02%

The increase in Respondent's market share described above is the direct result of its advertisements and offers for sale of five-quart pails of vanilla ice cream at a reduced retail price, which reduced retail price was below Respondent's cost. The loss of market share by Respondent's competitors in the aggregate and by its individual competitors was directly caused by Respondent's sales, offers for sale and advertisements of five-quart pails of vanilla ice cream below cost.

19. During the spring and summer of 1975, two competitors of Respondent in Fairmont, Minnesota, sustained injury as the result of Respondent's advertisements, offers and sales of different grades of milk at reduced retail prices which were below Respondent's cost. These competitors, Marv's Town & Country, and Mike's Clover Farm Grocery, suffered substantial injury which was caused by Respondent's sales below cost. In the case of the latter retailer, its general business was steadily increasing, while, at the same time, its sale of milk was decreasing during and after the period during which Respondent was advertising, offering and selling milk below cost. In the case of the former retailer, it was forced to reduce its prices to meet Respondent's low prices, and its ultimate bankruptcy appears to be attributable in some substantial part to the losses due to Respondent's sales below cost.

20. Any Findings which are more properly considered as conclusions are adopted as such.

From the facts so found, the hearing Examiner makes the following

CONCLUSIONS OF LAW

1. The Minnesota Department of Agriculture, by its Commissioner, and the Minnesota Office of Hearing Examiners, duly acquired and has jurisdiction in this matter.

2. All parties have fulfilled all relevant, substantive and procedural requirements of law and rule.

3. Respondent advertised, offered and sold selected dairy products, namely, different grades of milk and vanilla and flavored ice cream, below "cost" as that term is defined in Minn. Stat. §§ 32A.04, subd. 1(o) and 325.01.

4. Each of the violations specified hereinabove constitutes a separate and distinct violation of Minn. Stat. § 32A.04, subd. 1(o).

5. Respondent has erroneously attempted to reduce its per-unit costs by giving effect to increased volume which occurs during the periods of violation, whereby such increased volume is the direct result of Respondent's sales below cost.

6. Respondent's unlawful trade practice was for the purpose of or with the effect of restraining, lessening or destroying competition, or was for the purpose of or with the effect of injuring one or more competitors or injuring one or more persons dealing in selected dairy products, or was for the purpose of or with the effect of impairing or preventing fair competition in the sale of selected dairy products.

Based on the foregoing, the Hearing Examiner makes the following

RECOMMENDATION

That Respondent be found to have violated the Minnesota Dairy Industry Unfair Trade Practices Act and that it be dealt with as in such Act made and provided.

Dated this 28th day of November, 1978.

MYRON S. GREENBERG
Hearing Examiner

MEMORANDUM

The Legislature declared in Minn. Stat. § 32A.02 that selected dairy products are important sources of revenue to a large number of citizens in this state and are important items of food essential to the health and welfare of the state's people. It further acknowledged that the passage of the Dairy Industry Unfair Trade Practices Act was caused by the development of certain trade practices which resulted in unfair competition and which upset the orderly marketing of selected dairy products. These unfair trade practices, according to the Legislature, caused financial loss to the producers in this state. Thus, the purpose of the Act is to eliminate those certain trade and marketing practices which are done with the intent of, *or* have the effect of, destroying, lessening or restraining competition, or injuring one or more competitors, or injuring one or more persons dealing in selected dairy products, or impairing or preventing fair competition in their sale. The Legislature concluded its declaration by mandating,

> All of the provisions of Section 32A.01 to 32A.09 shall be liberally construed to achieve these ends and administered and enforced with a view to carrying out the above declaration of policy.

Fair trade laws are designed to protect an industry or part of an industry by preventing some type or types of competition. It is not within an administrative Hearing Examiner's responsibility or authority to determine the effectiveness, wisdom or constitutionality of duly enacted statutes. When such laws are understandable and facts are shown to be applicable, the enforcement of the statutory provisions must be upheld.

It is not the intention of the Legislature to statutorily impose upon either the Complainant or the Respondent an impossible responsibility. Thus, it is not a defense to Complain-

ant's allegation of below-cost selling that Respondent cannot, itself, define its own cost of doing business. Such a claim by Respondent is rendered even more fallacious by the ample evidence of Respondent's cost of doing business. (For example, the parties have stipulated store cost data.) Respondent having stipulated to a method for establishing and figures representing the cost of doing business (expense allocations), urged the Examiner in posthearing submissions to disregard those figures and to make a finding that such an allocation is improper with respect to selected dairy products. Yet Respondent offers no alternative method.

The burden of going forward with the evidence, let alone the burden of proof, shifted to Respondent once Table 3 of the fact Stipulation was received into evidence; but Respondent elected not to shoulder that burden or failed to sustain it. The Commissioner's witness, Robert F. Thimmesh, the State's expert on the subject, testified that all major retailers express the cost of doing business as a percentage of sales. Respondent, rather than offering testimony to the contrary, produced its Exhibit No. 8, which clearly expresses the cost of doing business as a percentage of sales. Once having offered that exhibit, it is true that Respondent attempted to convince the Examiner that this and similar tables were used for internal and unrelated purposes, but the exhibit is the best illustration as to Respondent's own cost analysis.

Respondent urges that the allegation of total costs of doing business must be on a basis which is rationally related to the true cost associated with the sale of the products currently under consideration. Absent contrary evidence in the record, the Examiner accepts the formula and figures set forth in the Stipulation of Facts as establishing such "true cost."

After establishing sales below cost for the selected dairy products, the issue becomes whether these sales were for the "purpose" *or* "with the effect" of violating the statute. The products under consideration, especially the various grades of milk, are staple or basic items. They are "everyday" items. A consumer does not "stock up" on milk. Thus, it would be unreasonable for Respondent to aver that the purpose of the prices advertised and charged was to generate increased sales of milk in the marketplace. Its intended purpose was to increase its own share of the market at the expense of competitors. Commissioner's Exhibit 2 supports this argument and was hardly impeached by Respondent. As and when Respondent reduced its prices, not only did its share of the market increase during the time of the price reductions, but it was able to retain a certain percentage of customers after it increased its prices and resumed selling at a retail price above cost. Thus, Commissioner's Exhibit 2 graphically illustrates Respondent's success in violating the statute and reaping the benefits from such violation—the exact benefits prohibited by statute. It is insufficient for Respondent to counter this argument by saying the higher the quantity of its sales, the lower its cost. This is simply a bootstrapping argument not condoned by the statute. This is hardly the "healthy price competition" with which Respondent seeks to be credited.

Chapter 32A is a civil statute. There are no criminal implications. "Imposition of any penalties under this section shall be construed as civil and not criminal in nature." Section 32A.-09, subd. 6. The Commissioner's burden of proof need only be by a preponderance of the evidence, and not beyond a reasonable doubt. The Commissioner has sustained its burden throughout these actions. Not only has he amply demonstrated

below-cost sales, but he has demonstrated injury by diminution of competition in the marketplace.

There is no showing from the evidence that two of Respondent's Fairmont, Minnesota competitors were on precarious financial ground or were thrown out of business as a result of unrelated causes. Indeed, the state of the record is that these two stores were doing just fine until Respondent violated the statute. There was affirmative showing that both of these retailers were solvent, healthy competitors who permanently were damaged by Respondent. Respondent's business objective was not a rational objective of generating more sales in the overall market place, but clearly for the purpose of injuring, for example, the two Fairmont competitors, and destroying competition. What further evidence is needed to demonstrate the illegal purpose than the increase in market share and the resultant catastrophic bankruptcy of a competitor?

It is the inescapable conclusion that Respondent sold these relevant products at a retail price below its cost. The cost was stipulated to between the parties, and if Respondent is unable more particularly to allocate costs to these products, then the stipulated cost must prevail. As a result of its below cost sale, injury and damage were sustained in all relevant markets. The arguments propounded in Respondent's hearing brief are generally rejected as (1) relating primarily to the constitutionality and wisdom of the applicable statutes and (2) failing to recognize the significance of the stipulated fact establishing a reasonable formula to apply to the cited products to determine their cost and whether there occurred any sales below cost.

MYRON S. GREENBERG

IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

No. 51638

RED OWL STORES, INC.,

Appellant,

vs.

COMMISSIONER OF AGRICULTURE,

Appellee.

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Red Owl Stores, Inc., the above-named appellant, hereby appeals to the Supreme Court of the United States of America from the final judgment of the Supreme Court of Minnesota, reversing the decision of the district court, entered in this action on September 18, 1981.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated:

GRAY, PLANT, MOOTY,
MOOTY & BENNETT
By CURTIS D. FORSLUND
THOMAS DARLING
SUSAN L. SEGAL
Attorneys for Appellant
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER [illegible]
CLERK

No. 81-1855

IN THE

Supreme Court of the United States

October Term, 1981

RED OWL STORES, INC.,

Appellant,

vs.

COMMISSIONER OF AGRICULTURE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS

WARREN SPANNAUS
Attorney General
State of Minnesota
DOUGLAS C. BLOMGREN
Special Assistant
Attorney General
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-3206
Attorneys for Minnesota
Commissioner of Agriculture

May 4, 1982.

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

Whether the "below cost sales" provision of the Minnesota Dairy Industry Unfair Trade Practices Act, which specifies certain items that must be included in the calculation of a retailer's cost and which requires the retailer's cost of doing business to be allocated to the subject products in a manner consistent with reasonable accounting standards, violates the fourteenth amendment either because it is vague or arbitrary.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Motion	1
Statement of the Case	2
Argument	6
I. The Act is not Unconstitutionally Vague	6
II. The Act is not Unconstitutionally Arbitrary	8
Conclusion	14

TABLE OF AUTHORITIES

	Page
Federal Cases:	
Bandini Petroleum Co. v. Superior Court, 285 U.S. 8 (1931)	8
Cameron v. Johnson, 390 U.S. 611 (1968)	8
Doremus v. Bd. of Education, 342 U.S. 429 (1952)	12
Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir. 1981)	6, 7
Minnesota v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981)	10
Nebbia v. New York, 291 U.S. 502 (1934)	13
Portland R. Co. v. Railroad Commission, 229 U.S. 397 (1913)	9
Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925)	6
United States v. National Dairy Products Corp., 372 U.S. 29 (1963)	6

Page

United States v. Ragen,
314 U.S. 513 (1942) 8
United States v. Shreveport Grain &
Elevator Co., 287 U.S. 77 (1932) 8
Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 10, 11
Warth v. Seldin,
422 U.S. 490 (1975) 12
William Inglis & Sons Baking Co. v. ITT Cont.
Baking Co., 389 F.Supp. 1334 (N.D. Cal. 1975) ... 11
Zenith Radio v. Matsushita Electric Industrial Co.,
402 F.Supp. 251 (E.D. Pa. 1975) 7

State Cases:

Baseline Liquors v. Circle K Corp.,
129 Ariz. 215, 630 P.2d 38 (Ct.App. 1981) 7
Dikeou v. Food Distributors Ass'n.,
107 Colo. 38, 108 P.2d 529 (1940) 7, 13
People v. Kahn,
19 Cal.App. 2d 758, 60 P.2d 596 (1936) 7
State v. Langley,
53 Wyo. 332, 84 P.2d 529 (1940) 7
State v. Sears,
4 Wash.2d 200, 103 P.2d 337 (1940) 7
Trade Commission v. Skaggs Drug Centers, Inc.,
21 Utah 2d 431, 446 P.2d 959 (1968) 7

Constitution, Statutes:

U. S. Const. amend. XIV ..... *passim*
Minn. Stat. § 32A.01, *et seq.* ..... *passim*
Minn. Stat. § 325D.01, *et seq.* ..... *passim*

No. 81-1855

IN THE

Supreme Court of the United States

October Term, 1981

RED OWL STORES, INC.,

Appellant,

vs.

COMMISSIONER OF AGRICULTURE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS

The appellee Minnesota Commissioner of Agriculture moves the Court to dismiss the appeal herein on the ground that the question on which the decision of the cause depends is so insubstantial as not to need further argument.

The Jurisdictional Statement submitted by the appellant fully sets forth the constitutional provision and statutes involved.

STATEMENT OF THE CASE

This is a direct appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of the Minnesota Dairy Unfair Trade Practices Act. In its decision, the Minnesota court concluded that the "below cost sales" provisions of the Act did not violate the due process clause of the fourteenth amendment. The court also upheld the Minnesota Agriculture Commissioner's determination that appellant Red Owl Stores, Inc. violated the Act.

Red Owl Stores, Inc. [hereinafter referred to as "Red Owl"], is a retailer of "selected dairy products" as that term is defined by the Minnesota Dairy Industry Unfair Trade Practices Act, Minn. Stat. ch. 32A (1980) [hereinafter referred to as "the Act"]. In 1976, the Minnesota Commissioner of Agriculture issued complaints alleging that Red Owl had sold, offered and advertised for sale selected dairy products at prices below cost in violation of the Act.

Under the Act, "cost" is defined to include the lower of either the invoice price or replacement cost, without deducting customary cash discounts, plus certain taxes and the cost of doing business at the retailer's place of business. "Cost of doing business" or "overhead expense" is defined in Minn. Stat. § 325D.01, subd. 7 (1980) to include labor, including salaries and bonuses, rent depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising and other fixed and incidental expenses.

After an evidentiary hearing on the complaints before an administrative hearing examiner, the Commissioner concluded that Red Owl had sold selected dairy products below cost and ordered it to cease and desist from such practices. In issuing his order, the Commissioner adopted the Findings of Fact,

Conclusions of Law and Memorandum of the Hearing Examiner.[1] Appellant's Appendix at A-24.

In his findings, the Commissioner determined the invoice price of the dairy products sold by Red Owl and added to that price Red Owl's cost of doing business to determine the "cost" of the items sold. Although the Act requires that cash discounts enjoyed by Red Owl be disregarded in this calculation, the Commissioner did deduct those discounts from the invoice price in making his computations. Appellant's Appendix at A-3, n. 1. The cost as computed by the Commissioner was then compared to the price at which Red Owl sold the dairy products. From this comparison, the Commissioner determined that Red Owl had violated the Act by selling the subject dairy products at a price below cost. Findings 9-15, Appellant's Appendix at A-30 *et seq.*

At its heart, the controversy before the hearing examiner, the Commissioner and this Court revolves around the proper method of allocating the appellant's "cost of doing business" to the dairy products which were sold. During the relevant period, Red Owl had allocated its corporate cost of doing business to each of its stores on the basis of each store's share of total sales. The costs were further allocated to each department in a store on the basis of the department's share of total store sales. Appellant's Appendix at A-3. While it had attempted to do so before the relevant period, Red Owl had abandoned as impractical its efforts to further allocate the costs on a product-by-product basis. Appellant's Appendix at A-4, A-27, A-41.

---

[1] Under the Minnesota Administrative Procedure Act, Minn. Stat. § 15.041 *et seq.* (1980), hearing examiners independent from any state agency conduct contested case hearings and recommend findings and conclusions to the Commissioner. The Commissioner makes the final determination.

The Commissioner essentially adopted the cost allocation method used by Red Owl and other major grocery retailers. Appellant's Appendix at A-28, A-41. The Commissioner found as a matter of fact that the costs of doing business associated with dairy products were not substantially different from those associated with other items sold by Red Owl. Appellant's Appendix at A-28. Accordingly, the Commissioner first used stipulated figures to calculate a ratio of total store sales to total store overhead for each Red Owl store covered by the complaint. The result was each store's cost of doing business, expressed as a percentage of store sales. These costs ranged between 20 and 23 percent for each of the stores concerned. Findings 9-15, Appellant's Appendix at A-30 *et seq.* The Commissioner then multiplied this percentage cost of doing business by the invoice price of the subject dairy products to determine that portion of store overhead properly attributable to the subject dairy product. This amount was then added to the product's invoice price to determine Red Owl's "cost" for the product.[2] The Commissioner then compared this "cost" with the price at which the product was sold and concluded that Red Owl had violated the Act by selling below cost.

---

[2] Example:

Delivered cost of milk (subtracting cash discount)	Approx.	$ .87
plus overhead of approx. 20% (.20 x .87)	Approx.	.17
"cost" to Red Owl:		$1.04

See Finding 11, Appellant's Appendix at A-32

Although Red Owl had earlier stipulated to the figures to be used in allocating costs, in post-hearing argument it urged the Hearing Examiner to disregard the figures. Appellant's Appendix at A-41. Red Owl argued that the figures were not indicative of the "true" costs associated with dairy products because those costs were not allocated on a product-by-product basis. Yet it offered no other evidence of "true" cost. It did supply a witness who testified that costs of doing business could be allocated using methods other than those based on a percentage of total store sales. The witness hypothesized that, using a method based on shelf space, it would be possible to achieve figures other than those arrived at by the Commissioner. However, Red Owl never submitted any allocation of costs based on this or any other alternative method and its witness conceded that the method used by the Commissioner was reasonable. Appellant's Appendix at A-7. Because the calculations of cost made by the Commissioner were never rebutted by Red Owl, those calculations formed the basis of the Commissioner's decision that Red Owl had violated the Act.

Red Owl appealed the Commissioner's decision to the state district court and in July, 1980, that court vacated the Commissioner's order. That decision was appealed and on September 18, 1981, the Minnesota Supreme Court reversed the district court and reinstated the Commissioner's findings and order. On January 5, 1982, the court denied Red Owl's petition for reargument.

ARGUMENT

The appellant erroneously contends that the Act is either unconstitutionally vague or unconstitutionally arbitrary. The arguments asserted by Red Owl in support of that contention raise no substantial federal question.

I. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE.

The appellant's first argument is that the Act is unconstitutionally vague because it does not expressly provide the method by which "costs of doing business" are to be allocated among the subject dairy products. Jurisdictional Statement at 8. The Minnesota Supreme Court rejected this argument finding, as did the Commissioner, that an allocation consistent with reasonable accounting standards would satisfy the Act. Appellant's Appendix at A-7. While the Act is not unconstitutionally vague in any event, this interpretation of the statute by the highest court in Minnesota precludes any argument the appellant might have had.

When a regulatory statute is challenged on vagueness grounds, this Court has reviewed the statute to determine whether it reasonably informs the public of the acts it proscribes. This determination, however, is not made in a vacuum. Where statutes are intended to remedy a specific problem, or are addressed to a particular business, this Court reviews the statute in light of its intended purpose and those to whom it is addressed. In the area of business regulation, statutes have not been held to strict requirements of precision. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 36 (1963), *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), *cert. den.* 50 U.S.L.W. 3274 (U.S. Oct. 13, 1981). *Cf. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 240-41 (1925).

The Act considered in this case is clearly directed at the dairy industry and is intended to prevent predatory price wars in that industry. Appellant's Appendix at A-8. The terms employed by the Act are those commonly associated with the business to which the Act applies. They clearly inform those affected that sales of dairy products, when made at prices below cost and with the intent or effect of reducing competition, are illegal.

As defined by the Act, "cost" includes invoice price, disregarding cash discounts as defined by the Act, plus taxes and the cost of doing business. The term "cost of doing business" or "overhead expense," is further defined to include specific items generally associated with business enterprises. Minn. Stat. § 325D.01 (1980). The appellant's only quarrel with this definition is that it does not expressly provide the method by which the cost of doing business is to be allocated among the dairy products covered by the Act. But the absence of an express direction provides no ground upon which to invalidate the Act.

The Minnesota Supreme Court has interpreted the Act to require that overhead expenses be allocated in a fashion consistent with reasonable accounting standards. Appellant's Appendix at A-7.[3] While such a standard permits more than

---

[3] This determination is consistent with numerous decisions under similar laws in other states. Baseline Liquors v. Circle K Corp., 129 Ariz. 215, 630 P.2d 38 (Ct. App. 1981) *cert. den.* 50 U.S.L.W. 3352 (Nov. 2, 1981); State v. Sears, 4 Wash.2d 200, 103 P.2d 337 (1940); People v. Kahn, 19 Cal. App.2d 758, 60 P.2d 596 (1936); State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938); Dikeou v. Food Distributors Ass'n, 107 Colo. 38, 108 P.2d 529 (1940); Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968).

Even if the state court had not already supplied a clarifying interpretation, the Act would remain valid. *See* Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir. 1981) *cert. den.* 50 U.S.L.W. 3279 (Oct. 13, 1981); Zenith Radio v. Matsushita Electric Industrial Co., 402 F. Supp. 251 (E.D.Pa. 1975).

one method of allocating overhead costs, it does not render the Act unconstitutionally vague. Rather, it permits retailers to use accounting methods with which they are already familiar. The only requirement is that the method used be one which employs reasonable accounting procedures.

On numerous occasions in the past, this Court has upheld similar standards against vagueness challenges. *Cameron v. Johnson,* 390 U.S. 611 (1968) ("unreasonably interferes"), *United States v. Ragen,* 314 U.S. 513 (1942) ("reasonable allowance"), *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932) ("reasonable variations shall be permitted"), *Bandini Petroleum Co. v. Superior Court,* 285 U.S. 8 (1931) ("unreasonable waste of natural gas"). Here, as in those cases, there can be little question that the statutory standard is sufficiently definite to fulfill the requirements of due process.

II. THE ACT IS NOT ARBITRARY.

The appellant also contends that the Act is unconstitutionally arbitrary because the methods used to calculate "cost" under the Act do not indicate the retailer's "true" cost. Jurisdictional Statement at 11. Red Owl argues that only a method of calculating cost which allocates the "cost of doing business" on a product-by-product basis, rather than the store-wide basis actually used by Red Owl and adopted by the Commissioner, fulfills the demands of substantive due process. The Minnesota Supreme Court rejected the argument, noting that both the Commissioner and Red Owl agreed that product-by-product cost allocation was too difficult to be practical. Appellant's Appendix at A-7. Red Owl further argues that the Act is arbitrary because it requires the Commissioner to disregard "customary cash discounts" in the

calculation of cost. Jurisdictional Statement at 10. The Minnesota court refused to consider this argument because, in this case, the Commissioner did deduct those cash discounts received by Red Owl. Since that deduction worked to Red Owl's benefit, the court held that Red Owl could not complain. Appellant's Appendix at A-5, A-6.

A. Cost Allocation.

The appellant's argument challenging the Act's allocation of the "cost of doing business" raises no substantial question. In fact, it raises no question which is subject to review by this Court. The Commissioner's determination to allocate the cost of doing business on a store-wide, rather than product-by-product, basis was based upon a finding of fact which was later upheld by the Minnesota Supreme Court. Appellant's Appendix at A-28, A-10-11. Evidence before the Commissioner indicated that overhead costs associated with dairy products were not substantially different from those associated with other items in Red Owl stores. Therefore, either method of cost allocation would produce substantially similar results. Consequently, this case does not present the issue the appellant seeks to have determined; *viz.*, whether the costs of doing business must be allocated on a product-by-product basis. Instead, it raises only the factual issue of whether the evidence supported the Commissioner's finding. Except in rare circumstances, not present here, this Court does not engage in review of such factual determinations. *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913).

Even if the issue raised by Red Owl were properly before this Court, it would present no substantial question. In reviewing other economic regulations attacked on substantive

due process grounds, this Court has applied a very narrow scope of review:

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 5 (1976).

In this case, Red Owl was required to establish that the "cost of doing business" provision of the Act bears no rational relationship to any conceivable proper public purpose. It could not meet that burden before the Minnesota court and cannot meet it now.

The Minnesota Legislature's determination that predatory price wars in the dairy industry are inimical to the public welfare is not one which this or any other court may second guess. *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981); *Nebbia v. New York*, 291 U.S. 502 (1934). Nor can it be seriously questioned that prohibiting retail sales of dairy products at prices below cost is a rational method of preventing the practice. The Act's method of determining "cost" is also rationally related to that purpose.

To be effective and enforceable, the Act must incorporate some method of calculating "cost" which is susceptible of reasonable application. By requiring "overhead" to be allocated according to reasonable accounting standards, those goals of effectiveness and enforceability are achieved. The Act permits retailers to gauge and defend their own conduct using accounting methods with which they are familiar rather than *requiring* them to allocate costs on a virtually impossible

product-by-product basis.[4] Similarly, where predatory pricing has occurred, the Act permits the Commissioner to establish a violation using accepted accounting methods rather than requiring him to use a method which all agree defies practical application.

The only support Red Owl offers for requiring product-by-product allocation is a district court's interlocutory order in *William Inglis & Sons Baking Co. v. ITT Con. Baking Co.*, 389 F. Supp. 1334 (N.D.Cal. 1975), *rev'd*, 526 F.2d 86 (9th Cir. 1975). In that case, the district court was confronted with several competing calculations of cost provided by the parties in an action under the Robinson-Patman Act and a California trade regulation statute. The court concluded that those methods of allocating costs which best apportioned overhead costs to the subject items would be "legally acceptable." The Court made no suggestion that any particular method was mandated by the fourteenth amendment. Nor did it suggest that a state legislature could not specify the method of calculating costs as long as that method bore some rational relationship to the legislature's purpose.

Contrary to Red Owl's contention, nothing in the due process clause requires the use of standards so difficult to apply or so precise that they defeat the very purpose of the legislation. That clause was never intended to thwart permissible state goals. Rather, its function is to assure that the burdens placed on those affected by legislation are reasonably justified by their purpose. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Here, the cost allocation

[4] If a retailer chose to use a reasonable accounting method which achieved product-by-product cost allocation, that method would be permitted by the Act. In this case, however, neither the Commissioner nor Red Owl used such a method.

provision of the Act is reasonable and practical. It fulfills all requirements of the fourteenth amendment.

B. Cash Discounts.

Red Owl's attack on the Act's "cash discount" provision is not susceptible to review by this Court. Under Minn. Stat. § 325D.01, "cash discounts" are those allowances made to retailers who pay for products within a specified time. Under the Act, these discounts are to be disregarded in the calculation of "cost." However, in this case, the Commissioner included those discounts in his calculations, thus reducing Red Owl's costs and diminishing the possibility that it would be found in violation of the Act. The Minnesota Supreme Court concluded that Red Owl could not complain of the provision, having suffered no detriment from it. Appellant's Appendix at A-3, A-6. Just as in the Minnesota court, Red Owl possesses no standing here to challenge the validity of a statutory provision which was never applied to it and under which it suffered no injury. *Warth v. Seldin*, 422 U.S. 490 (1975); *Doremus v. Board of Education*, 342 U.S. 429 (1952).

Even if the appellant were permitted to challenge the validity of the "cash discount" provision, its challenge would raise no substantial federal question. Under the Act, cash discounts are excluded from the calculation of cost because the legislature concluded that those discounts represent the cost of borrowing money rather than the cost of dairy products. As other courts have recognized, cash discounts received by those vendors who promptly pay for their products are "generally regarded as financial management income, not a reduction of the cost of goods, but as compensation for interest on bor-

rowed money . . . ." *Dikeou v. Food Distributors Ass'n.*, 107 Colo. 38, 108 P.2d 529 (1940).

While exclusion of cash discounts from the calculation of cost could reduce a retailer's ability to sell dairy products at prices lower than its competitors which do not receive the discounts, that fact is irrelevant under the due process clause. Due process does not require that a particular competitive advantage enjoyed by a particular retailer be forever guaranteed. Indeed, the due process clause would permit the legislature to fix a price for dairy products and thereby effectively eliminate all price-related competitive advantages. *Nebbia v. New York*, 291 U.S. 502 (1934). Further, the legislature could determine that the ability to pay cash for dairy products indicates a retailer's greater relative financial strength and, therefore, a greater ability to engage in predatory pricing. To reduce that ability, the legislature could rationally determine to minimize the benefits of cash discounts by excluding them from the computation of "cost" under the Act.

The "cash discount" provision rationally furthers the purposes of the Act in a manner consistent with the demands of due process.

CONCLUSION

The "below cost sales" provisions of the Minnesota Dairy Industry Unfair Trade Practices Act are neither vague nor arbitrary. The Act clearly identifies those acts which it proscribes and its operative terms incorporate standards which are both reasonable and rationally related to the purpose of the Act. The appellant's arguments to the contrary raise no substantial federal question and warrant no further consideration by this Court.

Dated: May 4, 1982.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
DOUGLAS C. BLOMGREN
Special Assistant
Attorney General
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-3206
Attorneys for Minnesota
Commissioner of Agriculture